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cured by him in New York. It was probably by an American artist, and evidently taken soon after the battle of Bunker Hill. It is inscribed as follows: "An Exact View of The Late Battle at Charlestown, June 17th, 1775," &c. By B. Romans. It is from a copperplate, 16 1-2 by 11 inches, and colored by hand.

The President announced that the Standing Committee had accepted the invitation of our associate, Mr. Mason, for the Society to meet at his house on Tuesday evening, the 21st inst.

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### SPECIAL MEETING.

A social meeting of the Society was held at the house of Mr. R. M. MASON, No. 1 Walnut Street, corner of Beacon Street, on the evening of Tuesday, the 21st of December, at seven and a half o'clock; the President in the chair.

In his opening remarks, the President indulged in some reminiscences relating to the house in which the Society were assembled, it having once been the residence of his father, the Hon. Thomas L. Winthrop, a former President of the Society.

The President read the following letter from our associate, Mr. W. S. Appleton, noticing the death of a Corresponding Member, Mr. John Bruce, F. S. A., of London.

Boston, Dec. 10, 1869.

DEAR MR. WINTHROP,—Had I supposed that the death of our Corresponding Member, John Bruce, F. S. A., would not have been noticed at the meeting yesterday, I would have sent you an extract from some English paper announcing it. He died on the 28th of October, aged 67, and the following appeared in the "Illustrated London News" for Nov. 13; the "Athenæum" and "Notes and Queries" have also printed memoirs:—

"John Bruce, Esq., F. S. A., an eminent antiquary, has just died, aged sixty-seven. He was of a Scottish family, and passed some time

at the Grammar School of Aberdeen. He was originally brought up to the law, but relinquished that profession about the year 1840. He then devoted himself entirely to literature, taking especial interest in mediæval lore, and editing several works of historical importance, amongst others, "Hayward's Annals of Elizabeth," "The Leicester Correspondence," "Verney's Notes on the Long Parliament," "Letters of Elizabeth and James VI.," and other productions of a similar character. One of his most recent and important works was a "Calendar of the State Papers," of the reign of Charles I. Mr. Bruce contributed also to the "Edinburgh Review" and to the "Gentleman's Magazine," of which latter periodical he was for some time editor, and he took a leading part in the management of the Society of Antiquaries, of which he was Treasurer and Vice-President. At the death of Lord Aberdeen, he became, in succession to that nobleman, one of the trustees of Sir John Soane's museum in Lincoln's-Inn-Fields.\*

I will only add that he was, most deservedly, elected a Corresponding Member of the Massachusetts Historical Society in June, 1867.

Yours very truly,

WM. S. APPLETON.

The President read a letter from Dr. H. I. Bowditch, accompanying the letters and memorials relative to the late Dr. Morton, and referred to in a former communication of Dr. Bowditch to the Society. (See proceedings of the meeting for January following.)

He also read a letter placed in his hands by the Recording Secretary, from Mr. A. James, of Halifax, N.S., dated December 3, 1869, and addressed to Mr. Edward Russell, of Boston, in which the writer refers to a document in his possession that he thinks should find a place in one of the public libraries of the United States. The document is the "original notes, in the handwriting of Mr. Mason, of the survey of Mason and Dixon's Line, bound up with the original correspondence between the Proprietors of Pennsylvania and Maryland, (Lord Baltimore and Thomas Penn); the two Commissioners; the Rev.

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\* An interesting letter of Mr. Bruce to the Vice-President of the Society of Antiquaries, prefixed to a "Defence of Sir Ferdinando Gorges against a Charge of having betrayed the Earl of Essex, written by Himself," is published in the Appendix to Folsom's Catalogue of Original Documents relating to Maine; New York, 1858. — Eds.

Mr. Maskelyn, the celebrated astronomer; and the public men of the two provinces interested." Mr. James expressed the desire that the manuscript should come to the United States rather than go to the British Museum, to which he had recently intended to offer it.

No action was taken in reference to the communication of Mr. James. Mr. DEANE stated that he had written to Mr. Russell (who had kindly forwarded to him Mr. James's letter), and expressed the hope that the manuscript might be sent to Boston for the inspection of the members; the document referred to being the same which was seen by Mr. Porter C. Bliss, while on a visit to Nova Scotia, in 1860, and noticed in the proceedings of this Society for August, 1865, p. 441.

The President also read a letter from our associate, Dr. Ellis, relating to another course of lectures by members of the Society. A number of subjects to be treated, and a list of persons to be invited to lecture, were read to the meeting.

Dr. Ellis's letter was referred to a committee consisting of Dr. Ellis, the Recording and Corresponding Secretaries.

Mr. DEANE read a paper on "The Forms used in issuing letters-patent by the Crown of England"; with some remarks relating to the early history of the Massachusetts Charter of 4th Charles I.

*The Forms in Issuing Letters Patent by the Crown of England.*

Of the original thirteen States of this Union, the larger part, as we know, were settled under charters (Provincial, Proprietary, or Municipal) from the Crown of England; and it should not be an uninteresting inquiry, to the student of our history, as to the official forms which were used in issuing these important documents. By these forms we see, that, although the grants were made by the Sovereign, in virtue of his prerogative, yet this exercise of his prerogative is surrounded by important formalities; in order that "no detriment or injury may result to the property or persons of his Majesty's

subjects, or to the rights and possessions of his Majesty's crown ; according to the principle which may be traced to the earliest periods of the English Constitution, that the prerogatives of the Sovereign are not to be exercised arbitrarily, or without discretion, but legally, and for the general benefit of the Commonwealth." \*

During the first and second years of Queen Victoria's reign, a law was passed, entitled "An act for keeping the Public Records" ; pursuant to which arrangements were made by the Master of the Rolls, for ascertaining the condition of the records, scattered in various depositories in London, and finally for bringing them together into one large department, and arranging them for use. In this way large masses of most valuable papers were collected from the Tower, the Rolls Chapel, the Chapter House, Carlton Ride, the Rolls House, the Remembrance House, Somerset House, Whitehall-yard, Westminster Hall, and other places. The most of these have now been consolidated with the Public Record Office in Fetter Lane.

Full reports were made to her Majesty, from time to time, of the progress of the work, by the Deputy Keeper of the Public Records, Sir Francis Palgrave, in which a most minute account is given of the nature of the papers, and of their condition. In his Second Report issued in 1841,† he also gives a full description of the "Offices and Documents connected with the Working of the Great Seal" ; showing "to your Majesty," to quote his own words, "that a large and very important portion of the Records of the Common Law side of the Court of Chancery is composed of the Enrolments of the documents which pass your Majesty's Great Seal, or of the Dockets supplying the place of Enrolments." "It therefore appeared expedient to his Lordship, the Master of the Rolls, that the origin and

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\* Sir Francis Palgrave, in his Report cited below.

† Second Report of the Deputy Keeper of the Public Records. (May 15, 1841.) Presented to both Houses of Parliament by Command of Her Majesty. London: Printed by William Clowes and Sons, Stamford Street, for Her Majesty's Stationery Office. 1841.

progress of all the several instruments which authorize the affixing the Great Seal, as well as of all the documents under the Great Seal, thus ultimately becoming Records of Chancery, should be traced through their different constitutional stages up to their source, the expressed or implied commands of the Sovereign. And by his Lordship's direction I have attended at the several offices and departments partially or wholly connected with the working of the Great Seal hereinafter noticed, and obtained the information now presented to your Majesty. . . .

"The whole process of passing Letters-Patent under the Great Seal is, however, very complicated, and differing according to the nature of the documents. The subject will therefore be rendered more intelligible, by first submitting to your Majesty a general view of the course or cycle of these documents ; which course, in the numerical majority of cases, that is to say, in the cases for Patents for Inventions, Charters for Incorporations, and other instruments of the like nature, issued as of grace and favor, upon the application of your Majesty's subjects, is the following :—

1. Petition addressed to the Crown, upon which is grounded the
2. Reference to the Law Officer or Officers by the  $\left\{ \begin{array}{l} \text{Privy Council or} \\ \text{Secretary of State.} \end{array} \right.$
3. Report  $\left\{ \begin{array}{l} \text{of the Attorney and Solicitor General, or one of them,} \\ \text{and of the Privy Council, if required, as explained below.} \end{array} \right.$
4. Warrant under your Majesty's Sign Manual, which is the authority for the
5. Bill (called the Queen's Bill) [or King's Bill, according as the Sovereign is a man or a woman] under your Majesty's Sign Manual ; which is the authority for the
6. Bill of Privy Signet ; which is the authority for the
7. Writ of Privy Seal ; which, being the *recipi* of the Lord Chancellor, is the authority for the
8. Patent under the Grand Seal."\*

In some cases, instanced by the writer in his elaborate Report, some of these stages are dispensed with. The process

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\* Palgrave's Report, p. 28.

relating to Charters of Incorporation principally interests us here, and I have drawn up from his Report as briefly as I could (and in the language of the Report, where it is practicable) a description of it. It is possible that this inquiry may throw some light upon the Massachusetts charter, and upon some of the questions which have been raised as to the intention of the Crown in granting it.

Charters of Municipal Incorporation, or affecting commercial, colonial, or general interests, are obtained by petition addressed to his Majesty in Council. The draft of the proposed charter is annexed to the petition, or is transmitted with it. The petition is then submitted to the King (or Queen) in Council, who usually refers the same to the permanent committee of the Lords of the Council, denominated the Board of Trade and Plantations. There the expediency of the application is discussed, and persons are heard who may be opposed to the same. If the Board of Trade favor the application, an order is made referring the draft officially to the Attorney and Solicitor General for their joint opinion. Upon the draft being returned by the Law Officers with a favorable opinion, the Board usually report to his Majesty in Council that it will be advisable that he should grant the charter. The King commonly approves the same, and makes an order commanding one of the principal Secretaries of State for the Colonial Department, to prepare a warrant\* for the royal signature, directing the Attorney and Solicitor General to prepare the Bill for passing the charter.†

The business of preparing the Bill, called the "King's Bill," for his Majesty's signature, is conducted in a permanent office called the "Patent Bill Office," or, more commonly, the "Patent Office"; of which the chief officer, styled "Clerk

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\* The warrant is a mandate, under the King's sign-manual, and countersigned by one of the principal officers of the Crown (*Report*, pp. 26, 27).

† Palgrave's Report, p. 29.

of the Patents to the Attorney and Solicitor General," is appointed by those officials. The King's Bill contains the whole form and settled draft of the King's charter, grant, or patent, in the words in which it is to pass the Great Seal, with the exceptions only of his Majesty's style at the beginning and the testing clause at the end ; but with the addition, at the foot, of the Docket, addressed to the King by the Attorney or Solicitor General, and signed by one or both of them.\* The Bill is engrossed upon parchment, and two other copies are made, also upon parchment, exactly of the same form and size ; which copies become the original Bills of Privy Signet, and Writs of Privy Seal, when afterward perfected by the respective officers. †

The King's Bill, bearing the signature of his Majesty, is then lodged in the Privy Signet Office, and the transcript upon parchment being received also from the Patent Office, this latter is collated, completed, and rendered a Bill of Privy Signet by the Clerk, who subscribes and affixes the King's Signet to the same, addresses it to the Lord Privy Seal, and forwards it to his office. ‡

When the Privy Signet comes into the office of the Privy Seal, the Keeper of the Records prepares the Bill or Writ of

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\* The Clerk of the Patents reads the draft carefully, and calls the attention of the Attorney and Solicitor General to any matter which appears to him to require further consideration. The signing of the Docket by the law officer or officers, is procured by the Clerk of the Patents. The King's Bill, and the transcripts, are delivered to the party or functionary by whom the same is to be passed, who takes the first to the office of the Secretary of State for the Home Department, where the King's signature is obtained to the King's Bill. "The transcripts in the same manner reach the Privy Signet and Privy Seal offices, and, excepting in the addition of the formal parts, and the addition of the needful signatures, no alteration is ever made in those transcripts" (*Report*, p. 30).

† Palgrave's Report, p. 30.

‡ "The Documents retained by the clerk of the Privy Signet are the following: — *The Docket Books*. These books contain copies of the Docket at the foot of the Queen's [or King's] Bill, as the same is signed by your Majesty's law officer or officers. They are neatly entered, and continue in a regular series from the year 1584 to the present time, forming about fifty volumes, written upon paper. They are carefully and fully indexed by names and subject-matters" (*Report*, p. 33).



Privy Seal, by adding the formal parts to the transcript of the King's Bill, which he has received from the Patent Office; and he presents the same to the Lord Privy Seal in order that the Privy Seal may be affixed thereto. The Seal is in the custody of his Lordship, and is kept at his house. There is one regular public Seal day every week.

The Writ of Privy Seal is then taken by the agent or messenger of the private party or public department on whose behalf it is issued, to one of the officers of the Chancery, the Clerk of the Patents, by whom the Patent is to be made out. When the Writ of Privy Seal reaches the Lord Chancellor he signs a memorandum called the *Recipi* at the foot of the same, and this signature is the authority to his officers for preparing the Letters-Patent, and affixing the Great Seal to the same.\*

We here see that the document passes through four processes, that it is repeated four times, before it reaches its final stage, the Letters-Patent. So it would seem that the greatest care is taken that nothing should be done surreptitiously.†

If the inquiry should now be made whether there is any evidence that our charter of 4th Car. I. passed through all these processes before coming at last to the Letters-Patent which hang at the State House, I have only to refer to some investigations made for me by Mr. Sainsbury in Her Majesty's Public Record Office in London, for an affirmative answer. I will quote only a few passages from his correspondence on this

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\* Palgrave's Report, p. 33.

† There is another process, that of enrolment, which may be briefly stated. "The writ of Privy Seal is transmitted, by the officer who makes out the patents, to the Six Clerks, who enroll the same, and who transmit the enrolment and writ to the Clerks of the Petty Bag, who transmit the same to the Chapel of the Rolls" (*Report*, p. 26). The parchment roll on which the Massachusetts charter is engrossed was examined by me in the Public Record Office in London, in 1866. It is composed of strips of parchment of about one foot in width and about two feet in length, the ends overlapping, and firmly attached together by strings. A number of patents, having otherwise no connection with each other, are thus attached together, and wound into one large roll from eight to ten inches in diameter. The words of the charter are merely engrossed upon the parchment with no attestation.

subject. After going over in brief the same ground I have just occupied more at length, Mr. Sainsbury says:—

“We have seen that the King’s Bill or Sign-Manual, the Bill of Privy Signet, the Writ of Privy Seal, and the Patent under the Great Seal, are or should be exact copies one of the other. To prove this in the present case [that is, in the case of the Massachusetts charter], I have carefully collated these Documents and find that they really are copies one of the other.”

I have spoken of the “King’s Bill,” that which bears the sign-manual of the king. There, we have seen, the charter appears for the first time in its official form, and that is the authority for every thing that follows. We have seen also that the parchment on which the King’s Bill is written, has at the foot the addition of a memorandum called the “Docket”, addressed to the king by the Attorney or Solicitor General (sometimes by both jointly), explaining briefly to his Majesty the nature of the instrument he is about to sign. Concerning these Dockets, Mr. Sainsbury says:—

“According to the constitutional practice of England, the Sovereign never signs any legal instrument without a Docket being attached explaining shortly the nature and contents of the Instrument to be signed.”

Mr. Sainsbury has sent me the Docket appended to the King’s Bill of the Massachusetts charter,\* which is as follows:—

Sign Manuals.  
Vol. x. No. 16.

May it please yo<sup>r</sup> most Excellent Ma<sup>ty</sup>:

Whereas yo<sup>r</sup> Ma<sup>ty</sup> most deare and royall father did by his lres Patents in the 18<sup>th</sup> yeare of his raigne incorporate divers noblemen & others by the name of y<sup>e</sup> Councell for the planting of New England in America and did thereby grant unto them all that part of America w<sup>ch</sup> lyeth betweene 40 degrees of Northerly latitude & 48

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\* The King’s (or Queen’s) signature is *invariably* at the head or top of grants and letters. “In the case in point,” says Mr. Sainsbury, “the signature is so *very* indistinct that only a person who knew where it should be would detect it.”

inclusive w<sup>th</sup> divers priviledges & ymmunities under a tenure in free soccage & reservacōn to y<sup>e</sup>. Crowne of y<sup>e</sup>. fift part of y<sup>e</sup>. gould & silver oare to be found there W<sup>ch</sup> said Councell have sithence by theire Charter in March last granted a part of that Continent to S<sup>r</sup>. Henrie Rosewell & others their heires & associates for ever w<sup>th</sup> all jurisdiccōns rightes priviledges and cōmodities of the same.

This Bill conteineth yo<sup>r</sup>. Ma<sup>ties</sup> confirmacōn & Grant to y<sup>e</sup>. said S<sup>r</sup>. Henry Rosewell & his partners & their Associates & to their heires & assignes for ever of y<sup>e</sup>. said part of New England in America w<sup>th</sup> the like tenure in socage & reservacōn of y<sup>e</sup>. fift part of gould & silver oare Incorporating them also by the name of the Governor & Company of the Mattachusetts Bay in New England in America w<sup>th</sup> such clauses for y<sup>e</sup>. electing of Governors & Officers here in England for y<sup>e</sup>. said Company, and powers to make lawes & Ordinances for setting y<sup>e</sup>. Governement & Magistracye for y<sup>e</sup>. plantacōn there \* & w<sup>th</sup> such exemptions from Customes & Imposicōns & some [such?] other priviledges as were originallie granted to the Councell aforesaid & are usuallie allowed to Corporacōns in England.

And is done by direccōn from the Lo. Keeper † upon yo<sup>r</sup>. Ma<sup>ties</sup> pleasure therein signified to his Lo<sup>ps</sup> by S<sup>r</sup>. Raph Freeman. ‡

(Signed)

RI. SHILTON §

Indorsed, — "1628, Expedit apud Westm<sup>r</sup>. Vicesimo septimo die Februarij Anno Reg<sup>i</sup>. Caroli quarto." ||

"p WOODWARD dep."

\* This last clause refers to the following in the charter: The Company have power "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, . . . for the *settling of the forms and ceremonies of government and magistracy* fit and necessary for the said plantation and the inhabitants there," &c., &c.; in virtue of which the Form of Government for the Colony, on page 177, was established. In the charter granted to the "Council for New England," established at Plymouth, the same power was given; namely, "to make, ordain, and establish all manner of orders, laws, directions, instructions, forms, and ceremonies of government and magistracy, fit and necessary for and concerning the government of the said colony and plantation," &c.

† Sir Thomas Coventry was at this time Lord Keeper.

‡ Sir Ralph Freeman was "Auditor of Imprests."

§ Sir Richard Sheldon, who signs this Docket, was the Solicitor General. In the Docket as printed by Chalmers, and in that in the Signet Book, it says, "subscribed by Mr. Attorney General"; which may be an inadvertence. Sir Robert Heath was at this time Attorney General. He must have been consulted, with his colleague the Solicitor General, when the application for the charter was before the Privy Council, and was also officially concerned in drawing up the King's Bill.

|| The Writ of Privy Seal (Bundle 281, part 71) thus concludes: — "Given under our Privy Seale at our Pallace of Westm<sup>r</sup>. the eight and twentieth day of Februarie in the fourth year of Our Reigne." "*Recipi 4 Martii 1628.*"

To what has already been said I purpose to subjoin a few remarks by way of applying it to some questions relating to the Massachusetts charter.

That the intention of the Crown was to create a corporation to reside in England would seem to be sufficiently clear. Such is the interpretation given to the charter by the Attorney and Solicitor General to whom the draft was referred by the Board of Trade, for to this effect the Solicitor informs the royal mind in the Docket we have just read. He tells his Majesty that the charter he is about to sign contains provisions for the electing of Governors and Officers *here in England* for the said Company, and powers to make laws and ordinances for settling the government and magistracy *for the plantation there*; with some [such ?] other privileges as were originally granted to the Council for New England; which Council, by name, had a "local habitation" in England.

The Council of Plymouth had, on the 19th of March, in the previous year, conveyed away so much of its territory as was embraced within the boundaries described in the Massachusetts charter. It also conveyed, so far as it legally could, all jurisdiction over that territory. But this latter amounted probably to little more than an abandonment of the Council's jurisdiction; so that the Massachusetts charter appears to have been intended to supply the place of the government thus withdrawn. The king, in this grant, reconveyed to the new patentees of this territory what had been before granted to the Council of Plymouth. The Chief Justices, in 1677, held that the Council of Plymouth, by its grant of 19th March, 1627-8, must be presumed to have "deserted the government."

Chalmers, in his Political Annals, page 147, gives a Docket of the Massachusetts charter, or a copy of it, as found in the "Privy Seal Office." This varies a little in its language from that to the King's Bill; but they agree as to the point in question.\* "Incorporating them by the name of the Governor

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\* Mr. Sainsbury says that each clerk, in the different offices, makes his own memorandum or Docket of the papers that pass through his office.

and Company of the Massachusetts Bay in New England, in America, with such other privileges\* for electing Governors and officers here in England for the said company, with such privileges and immunities as were originally granted to the said noblemen and others, and are usually allowed to corporations here in England.”†

The significance of this language has either been overlooked by some later writers, or there has been a misapprehension

\* As corrected by the Signet Office books it should read, “with such clauses for the electing of governors,” &c.

† I give below a copy of the Docket printed by Chalmers, but corrected by Mr. Sainsbury, on comparing it with the entry in the Signet Book; the Dockets there being usually the same as those in the Privy Seal Office. The heading to the paper printed by Chalmers is “A copy of the Docquet of the grant to Sir Henry Rosewell and others, taken out of the Privy Seal Office at Whitehall.” This, being in quotation marks, shows that it was a “copy,” found by Chalmers among the New-England Papers; and that he did not take it directly from the Docket Books, either of the Privy Signet Office, or the Privy Seal Office. The heading to Chalmers’s copy, as we have seen, indicates that it was originally “taken out of the Privy Seal Office.” The variation in the two copies is immaterial. The memorandum to Chalmers’s copy, that “their charter passed 4th March following,” could not of course have been taken from either of the above sources, but was a piece of information subsequently ingrafted upon it.

We are told by Sir F. Palgrave that the Docket Books in charge of the Clerk of the Privy Signet, contain copies of the Docket at the foot of the King’s Bill. In the case of the Docket copied below from that office, it will be seen to be rather an abridgment or paraphrase of that appended to the King’s Bill of the Massachusetts charter, as printed in the text, rather than an exact copy of it. There is, however, a substantial agreement in substance.

*Docket from Chalmers’s “Political Annals,” p. 147, corrected from the Docket Books in the Signet Office, Vol. IX.*

“A grant and confirmation unto Sir Henry Rosewell, his partners & their associates and\* to their heirs and assigns for ever, of a part of America called New England granted unto him by a Charter from divers noblemen and others, to whom the same was granted by the late King James with a tenure in soccage and reservation of one fifth † part of the gold and silver ore: Incorporating them by the name of the Governor & Company of the Massachusetts Bay in New England in America with such clauses for the electing of governors ‡ and officers here in England for the said Company; with such other privileges and immunities as were originally granted to the said noblemen & others and are usually allowed to corporations § in England. His Majesty’s pleasure signified by Sir Raphe Freeman upon the || direction of the Lord Keeper of the Great Seal of England; ¶ subscribed by Mr. Attorney General; procured by the Lord Viscount Dorchester.”

\* Chalmers omits “and”.

† Chalmers says “third part”.

‡ Chalmers says “such other privileges for electing governors”.

§ Chalmers says “here in England”.

|| Chalmers omits “the”.

¶ Chalmers omits “of England”.

as to the nature of the Docket in its connection with grants of incorporation. A distinguished jurist, a member of this Society, who has written an elaborate and acute analysis of the Massachusetts charter, cites this Docket in Chalmers; and admits, that it "is explicit enough to show that there was an intention when that minute was made, that the corporation should have a local habitation in England." But he regards this Docket as a mere "memorandum of the proceedings of the Council, prior to the grant of the charter." "This Docket," he proceeds, "taken in connection with the charter itself, and other admitted facts, furnishes most plenary proof that the intention thus appearing, was in fact changed *when the charter was afterwards drawn* and authenticated"; his interpretation of the charter itself not coinciding with that given by the writer of the Docket.\* But these views, as has been seen, are based upon a misapprehension of the nature of the Docket in question; which is simply the *précis*, or contents, briefly set forth, of the charter already drawn, and before the writer.

Having now seen what sort of a charter of incorporation the sovereign intended to grant to the Massachusetts patentees, or what his Solicitor-General informs him that he was granting, let us now briefly inquire what the grantees themselves supposed they were getting from his Majesty.

We find Cradock, the Governor, a few days after the passing of the charter under the Great Seal, writing in the name of the Company to Endicott, at Salem, under date of the 17th of April, as follows:—

"Since your departure we have, for the further strengthening of our grant from the Council at Plymouth, obtained a confirmation of it from his Majesty by his letters patents under the broad seal of England; by

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\* Joel Parker, LL.D., in his Lecture on "The First Charter, and the Early Religious Legislation of Massachusetts"; pp. 381, 382, of the volume of Lectures on the "Early History of Massachusetts," published by this Society in 1869.

which said letters patents we are incorporated into a body politic, with ample power to govern and rule all his Majesty's subjects that reside within the limits of our Plantation, as by the duplicate thereof, under the broad seal, which we have delivered to Mr. Sharpe to be delivered to you, doth fully appear." \*

Endicott is further told that he is confirmed Governor of the Plantation, and has a Council assigned to him in the Government of the Colony there.

At a meeting of the General Court in London, on the 30th of April, this Form of Government for the Colony was adopted :

"Whereas the King's most excellent Majesty hath been graciously pleased to erect and establish us, by his letters patents under the great seal of England, to be a body corporate, entitled *The Governor and Company of the Mattachusetts Bay in New England*; and thereby hath endowed us with many large and ample privileges and immunities, with power to make good and wholesome laws, orders, and ordinances, for the better maintenance and support of the said privileges, and for the better and more orderly and regular government to be observed in the prosecution and propagation of our intended voyages and the Plantation there; authorizing us to nominate and appoint and select fit persons amongst ourselves for the managing, ordering and governing of our affairs, both in England and in the places specified and granted unto us by virtue of his Majesty's said charter: We have, in the prosecution of the said power and authority given us, and in conformity thereunto, and to the purpose and intent thereof, and not otherwise, thought fit to settle and establish an absolute government at our Plantation in the said Mattachusetts Bay, in New-England; which, by the vote and consent of a full and ample Court now assembled, is thought fit and ordered, as followeth, viz.:

"That thirteen of such as shall be reputed the most wise, honest, expert, and discreet persons, resident upon the said Plantation, shall, from time to time, and at all time hereafter, have the sole managing and ordering of the government and of our affairs there; who, to the best of their judgments, are to endeavor so to settle the same as may make most to the glory of God, the furtherance and advancement of this hopeful Plantation, the comfort, encouragement, and future benefit of us and others, the beginners and prosecutors of this so laudable a

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\* Young's Chronicles of Massachusetts, pp. 141, 142.

work; the said thirteen persons so appointed to be entitled by the name of *The Governor and Council of London's Plantation in the Mattachusetts Bay in New-England.*" \*

On the 28th of May following, the Company, through Cradock, again write to Endicott: —

" We have, sithence our last, and according as we then advised, at a full and ample Court assembled, elected and established you, Captain John Endicott, to the place of present Governor in our Plantation there, as also some others to be of the Council with you, as more particularly you will perceive by an Act of Court herewith sent, confirmed by us at a General Court, and sealed with our common seal; to which Act we refer you, desiring you all punctually to observe the same, and that the Oaths we herewith send you, (which have been here penned by learned counsel, to be administered to each of you in your several places) may be administered in such manner and form as in and by our said Order is particularly expressed; and that yourselves do frame such other Oaths as in your wisdoms you shall think fit to be administered to your Secretary or other officers, according to their several places respectively." †

The form of the oaths, to be sent to New England to be administered there, "were here penned," says Cradock, "by learned counsel," — no less a person certainly than John Whyte the counsellor, who is supposed to have drawn the charter itself. A committee to frame the oaths had been appointed at a meeting of the General Court on the 30th of April. They had been prepared by the 7th of May, and were reported at a Court of Assistants held that day. ‡ At a Court of Assistants held on the 21st of May, "Mr. Eaton took the oath of Assistant. And he is desired to accompany Mr. Humphrey to Mr. Whyte the counsellor, to be satisfied concerning the administering oaths to the Governor and Council in New England." All the

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\* Young's *Chronicles of Massachusetts*, pp. 192, 193.

† Ibid. p. 173.

‡ See the form of the "Oaths of office for the Governor and Council" in *New-England*, in Young, as above, pp. 201-203.



“Orders concerning the establishment of the Governor and Council in New England,” were prepared at this meeting, and confirmed at the meeting on the following day; and the General Letter to be sent to Endicott, bearing date the 28th of May (from which the above extract is taken), was “concluded on.” They were despatched to him by vessels which sailed about the end of this month.

These extracts from the Company’s Records are familiar to all students of our history; but, familiar as they are, they are too important to be omitted here.

While the charter incorporated these patentees as the “Governor and Company of Mattachusetts Bay in New England,” they, exercising their powers in London, establish a subordinate government on the soil, under the name of “the Governor and Council of London’s Plantation in the Mattachusetts Bay in New England”; and all this they say they do by virtue of the powers granted to them in their charter, John Whyte being their legal adviser throughout.

By reference to the Company’s Records it will be seen that the business of the Company was vigorously prosecuted during the months of March, April, May, June, and July, in view of the settlement of the Colony agreeably to this interpretation of the charter. We here see a perfect coincidence of opinion between the Sovereign granting, and the patentees receiving; between the Solicitor of the Crown on the one hand, and the legal counsel of the Company on the other.

About five months after the granting of the charter, at a meeting of the General Court, on the 28th of July, —

“Mr. Governor read certain propositions conceived by himself, viz. That for the advancement of the Plantation, the inducing and encouraging persons of worth and quality to transplant themselves and families thither, and for other weighty reasons therein contained, [it is proposed] to transfer the government of the Plantation to those that shall inhabit there, and not to continue the same in subordination to the Company here, as now it is.”

“ This business,” says the Record, “ occasioned some debate” :

“ But by reason of the many great and considerable consequences thereupon depending, it was not now resolved upon, but those present are desired privately and seriously to consider hereof, and to set down their particular reasons in writing *pro et contra*, and to produce the same at the next General Court; where they being reduced to heads and maturely considered of, the Company may then proceed to a final resolution thereon. And in the mean time they are desired to carry this business secretly, that the same be not divulged.” \*

This, if I mistake not, is the first time we hear of such a proposition, which was to be regarded as strictly confidential. I have looked in vain through those admirable volumes — the “ Life and Letters of John Winthrop ” (of which I observe a new edition, with additional letters, is just published) — for some earlier intimation of such an intention. Although the proposition is said by the Record to have been conceived by Cradock himself, we must believe that it was the result of a previous conference among leading persons of the Company, and others who proposed conditionally to join it. The truth is, a new element had been brought into their counsels. John Winthrop was stretching his vision toward New England, and other prominent persons were looking in the same direction; and in one month after Cradock’s proposition, their views had been so far matured as to be embodied in the “ Agreement at Cambridge,” of the 26th of August. Twelve prominent gentlemen, including six who had been members of the Company from the first, agreed on that day to embark for the Plantation by the first of the following March; *provided*, that before the last of September, that is, before the expiration of four weeks, “ the whole Government, together with the patent for the said plantation, be first, by an order of Court, legally transferred and established to remain with us and others which shall inhabit upon the said Plantation.” †

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\* Young’s Chronicles of Massachusetts, pp. 85, 86.

† Ibid. pp. 281, 282.

Two days after the signing of this agreement, a special meeting of the General Court was called, —

“To give answer to divers gentlemen, intending to go into New England, whether or no the chief government of the Plantation, together with the patent, should be settled in New England, or here. Whereupon it was ordered, that this afternoon Mr. Wright, Mr. Eaton, Mr. Adams, Mr. Spurstowe, and such others as they should think fit to call unto them, whether they were of the Company or not, to consider of arguments against the settling of the chief government in New England; and on the other side, Sir Richard Saltonstall, Mr. Johnson,\* Captain Venn, and such others as they should call unto them, to prepare arguments for the settling of the said government in New England; and, that tomorrow morning, being the 29th of August, at seven of the clock, both sides should meet and confer and weigh each other's arguments, and afterwards at nine of the clock, (which is the time appointed of meeting for a General Court) to make report thereof to the whole Company, who then will determine the business.”

At the meeting of the Court on the 29th of August, a long debate was held, after which “Mr. Deputy put it to the question as followeth”: —

“As many of you as desire to have the patent and the government of the Plantation to be transferred to New England, so as it may be done legally, hold up your hands. So many as will not, hold up your hands.

“When, by erection of hands, it appeared by the general consent of the Company, that the government and patent should be settled in New England, and accordingly an Order to be drawn up.”

A month later, at a meeting of the General Court, on the 29th of September, the “Orders” for transferring the government and the patent were read, but they were not acted on; that business, being of such “great and weighty consequence, is thought fit to be deferred for determination until Sir Richard Saltonstall, Mr. Johnson, and other gentlemen be come up to London, and may be here present.”

“In the mean time it was propounded that a committee should be appointed,

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\* Saltonstall and Johnson signed the “Agreement at Cambridge.”

To prepare the business ;

To take advice of learned council whether the same may be legally done or no ;

By what way or means the same may be done, to correspond with and not to prejudice the government here ;

To consider of the time when it will be fit to do it ;

To resolve on whom to confer the government ; and divers other circumstances material to be resolved on," &c.\*

So cautious and doubtful were they as to the expediency and legality of this measure, that the Order for the transference of the government, &c., was never formally passed, although at the meeting on the 15th of October the Company seem to have assumed that it had been, and proceeded to make their arrangements accordingly.† A government for trade was to remain in London ; and articles of agreement between the adventurers and planters were drawn up by the legal counsellor of the company, Mr. Whyte, whose services and advice were so convenient for every emergency.

There would seem to be sufficient evidence in what has been said to show that the proposition for the transference of the chief government and patent to New England was a novel one to all parties concerned at the time it was made, and quite foreign to the purposes of the patentees when the charter was granted.

The " opinion " of Mr. Whyte the counsellor, as to the legality of this measure, has not been transmitted to us. We may suppose it to have run somewhat in this wise : —

" In framing your letters-patents I drew largely, according to my instructions, upon the provisions of the Charter of the Council for New England, who aliened their right of government over the territory which they granted to you. By this

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\* Young's Chronicles of Massachusetts, pp. 86-91.

† The vote taken on the 29th of August was merely a preliminary one, to test the sense of the meeting. This is clearly shown by the proceedings on the 29th of September.

new franchise from his Majesty you thus far stand in their place.

“The patent was drawn, and passed through all its forms, with no other view than that the chief government of the Company incorporated thereby would be located here in England, and that a government in subordination to this would be established on the plantation. Such was my understanding when I drew the patent, such was the understanding of the Crown Officers whom I was then constantly consulting, and such was your own opinion when the patent passed into your possession. Nothing else was wished for, and all your proceedings thus far have jumped with this interpretation of your grant. In accordance with this view I framed the Form of Government for the Colony which you have sent over to governor Endicott, with the duplicate of the patent.

“I will call your attention to some provisions which point directly to this use of the patent. There are clauses providing for the election of the charter officers,—the Governor, Deputy Governor, Assistants, &c., of the Company; and separate clauses for the appointing of ‘such chief commanders, captains, governors,’ &c., as shall be employed upon the plantation, or in the way by sea thither, or from thence,—a distinct class of officers. The first are elected annually from the freemen, according to the directions given in the patent; the second are ‘named’ or appointed in virtue of the ‘orders,’ &c., of the Governor and Company, in any General (or special) Court assembled. Observe also, that the officers who are to be employed in the government in New England, and in passing to and from said plantation, are respectively to have authority over all persons who shall go to inhabit there,—while going, while resident, and while returning. This certainly imports that the corporation is to *send* out these persons; for, if it was itself resident on the plantation, it would hardly expect to exercise control over his Majesty’s subjects before their arrival. The clause making provision in case of

fraud in exporting goods to a foreign country under pretence of carrying them to the plantation, clearly presupposes the residence of the Company within the realm. Many other provisions might be mentioned.

“As your legal counsel, I feel constrained to advise you that there is no precedent for the course proposed.

“It has been suggested that there is no clause in the patent absolutely forbidding its transference to the plantation. It is true there is nothing there prohibiting you to hold your meetings, or to elect your officers, either in Massachusetts Bay or in Nova Zembla ; and on this ground you might make your stand if driven to a defence. Should you transfer your patent and hold your meetings on the territory conveyed to the Company, you will naturally abolish your subordinate government, and thus make more simple the forms of your proceedings ; and if you are not molested by the crown, as I trust you will not be, with the great ocean between you and our State of England, carrying yourselves ever with great caution and prudence, your aims may have a quiet consummation. If your patent should be demanded for any reason, be slow in responding to such a call. There is sometimes great wisdom in delay. Always plead the necessities of your condition. Your great distance will be your protection. Remember this clause in the patent: that it ‘shall be construed, reputed, and adjudged in all cases most favorably on the behalf and for the benefit and behoof of the said Governor and Company, and their successors.’ There are many among you who feel that here ‘the times are out of joint,’ and who wish to aid in building up a new England in yonder distant wilderness. His gracious Majesty, perchance, would not grieve much at your departure. You have a wise leader in Master Winthrop, who proposes to join you, in case the chief government and patent are transferred hence. My advice to you is to take your letters-patents and *exeant omnes*.”

The rights and privileges granted in the Massachusetts charter have been subjected to severe analyses by legal minds,

in the light of well-established principles of municipal law of the present day; and sometimes opposite conclusions respecting some clauses of doubtful import have been arrived at. It may be suggested that this is not always the surest method to determine the historical question; namely, as to the *real intention* and understanding of parties to an instrument involving political franchises, drawn more than two centuries ago.\*

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\* Dr. Palfrey, who inclines to the opinion that John Whyte, in drawing the charter, had a care to have it free from any phraseology which might interfere with the disposition subsequently made of it, quotes the following passage from it, as significant of an express grant of power to that end. "The charter," he says, "empowers the Company and their assigns, not to '*send, carry, and transport,*' but, '*out of any our realms and dominions whatsoever, to take, lead, carry, and transport, for and into their voyages, and for and towards the said plantation in New England, all such and so many of our loving subjects, or any other, strangers, that will become our loving subjects and live under our allegiance, as shall willingly accompany them in the same voyages and plantation.*" (*History of New England*, I. 307.) But a reference to the Great Patent of New England will show that this precise language, word for word, is taken from that instrument, which empowers the Council for New England, professedly located in England, their successors and assigns, "to *take, lead, carry,*" &c., as above. (See *Trumbull's Conn't*. I. 555.) A similar provision will also be found in the first Charter of Virginia, granted in 1606. (*Stith*, App. p. 4.)

It has been said that the Massachusetts Charter, unlike the Great Patent for New England, did not locate the Company, incorporated by it, in England. The "Council for New England" was substantially a re-incorporation of the "Adventurers of the Northern Colony of Virginia," placing them more on a footing with their rivals, the Southern Colony, whose franchise had been twice enlarged since the original charter of 1606. By that charter two Councils were established: one located in London, the other in Plymouth. The new charter of the northern patentees would, of course, give them a location, as the former charter had done, to distinguish the two Councils from each other. The Massachusetts charter incorporated one Company, which needed no location to distinguish it from any other company. As I interpret the general policy of England at that time, this charter would, as a matter of course, locate the Company within the realm of England. I am aware that the practice of the Crown some years later became different.

On the theory that the Crown intended the Massachusetts Company to be located in England, there has been a difficulty in some minds in accounting for the silence of the government at the bold proceedings of the Company in transporting their patent and government to New England. But it is not apparent how soon the rumor of the transfer reached the royal ear. His Majesty had more important matters to look after, than a few Puritan gentlemen trying to establish a trade or to settle a Colony three thousand miles away in the wilderness of America. Complaints against the Colony, however, from time to time, reached the Council Table. On the 21st of February, 1633-4, Cradock, the former Governor, was summoned before the Council, and required to cause the Letters-Patents to be brought to the Board. "Cradock's reply," says Palfrey, "that the charter had gone to America, perhaps first apprised the government of that important fact." (*History*, I. 371.)

The elevation of Laud to the Archbishopric of Canterbury was a signal for renewed

But of one thing we may be certain: if the Massachusetts charter was inadequate to the purpose of carrying on a colony while the charter and chief government were located in England, it certainly proved itself, after its transfer, wholly inadequate as a constitution of government for the Colony of Massachusetts Bay. It became necessary, almost from the

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proceedings against the Puritans in both Old and New England. The scheme for a General Governor, and for the revocation of all colonial charters, was eagerly pressed. The "Council for New England" surrendered their charter to the king in June, 1635, after dividing the territory among themselves. The charter of Massachusetts was to be vacated, as a matter of course. Proceedings were instituted against it in Westminster Hall, in September of this year, by writ of *quo warranto*, brought by Sir John Banks, who had succeeded Sir Robert Heath as Attorney General. Cradock and fourteen other members of the Company were then in England.

Fourteen allegations of usurpation were brought. They may be seen in Hutchinson's Coll. Papers, pp. 101-103. Several of the members in England appeared, each of whom, except Cradock, severally pleaded that he had never usurped any of said liberties, and disclaimed; and there was judgment against them that for the future they should not intermeddle with any of the said franchises. Cradock came in, and having had time to interplead, made default, and judgment was given that he should be convicted of the usurpation charged, and that the said franchises should be taken and seized into the king's hands.

The inquiry has sometimes been made, why, if the government had been unlawfully established in the Colony, an allegation to that effect should not have appeared in the indictment against the Company? In reply it may be said, that it is doubtful how far the authorities were informed, at this time, as to the nature of the proceedings of the Company. They knew, the year before, that the charter had gone to New England, but they also knew that nearly one-half the grantees were residing in England, where nominally a government of trade was kept up. How radical a departure from the intent of the charter had been made, they may not have been informed. However this may be, to the Attorney General it was a matter of little moment. He intended to lay the axe at the root of the tree. He struck a blow at the charter itself, as being void *ab initio*. It will be seen that his allegations of usurpation are, nearly all of them, an enumeration, more or less accurate, of the powers granted in the charter; and, no doubt, were intended to be so regarded. We therefore see here the Attorney General's analysis of the charter itself. The first charge in the list of allegations is that they claim "to be a body corporate and politique by the name of the Governor and Company of the Massachusetts Bay in New England, and by that name to plead and be impleaded, answer and be answered in all courts and causes." If the company could not claim this, surely they could not claim to live. The seventh allegation is, "To keep a constant Council in England of men of their own Company and choosing, and to name, choose and swear certain persons to be of that Council; and to keep one Council ever resident in New England, chosen out of themselves, and to name, choose and swear whom they please to be of that Council." The Attorney finds these provisions in the charter, and, assuming the practice of the Company to have been in accordance therewith, he cites them as usurpations,—the instrument granting these powers being invalid. This would seem to be his reasoning.

(In the proceedings against the charter in the following reign, in 1684, which resulted in its forfeiture, the validity of the instrument was fully admitted. The usurpations



first, to assume powers for which no warrant can be found in that instrument itself.

In these remarks relative to the Massachusetts charter—which may be regarded as an appendix to the principal theme proposed to myself in this paper—the purpose has been to

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charged were confined to Levying Money; Imposing Tonnage Duties; Coining Money; and Imposing an Oath of Fidelity to the Colonial Government. The list might have been enlarged, but those charges were selected which could be the most easily proved; indeed, concerning which, as matters of fact, there could be no dispute.)

One might almost be inclined to think that the purpose of the strange proceeding in 1635 was, by denying the existence of the royal charter, to compel the patentees to produce the original in Court, in order, by legal means *or otherwise*, to obtain possession of it. But the grantees in London could easily have produced an authenticated copy from the Rolls Office, for the purposes of the trial, if they had chosen to contend.

Emanuel Downing, a brother-in-law of Gov. Winthrop, and a lawyer of the Inner Temple, was at this time living in London. He came to New England in 1638. In 1641, when Hugh Peter was about sailing for England, Downing addressed him a letter, which contains the following passage: "The Bishop caused a *Quo Warranto* to be sued forth in the King's Bench against our patentees, thinking to damn our patent, and put a General Governour over us; but most of them that appeared I did advise to disclaim, which they might safely do, being not sworn Magistrates to govern according to the patent; and these Magistrates which do govern among us, being the only parties to the patent, were never summoned to appear. Therefore if there be a Judgement given against the patent, it's false and erroneous, and ought to be reversed, which, a motion in the King's bench, without any long suit, by Writ of Error, may set right again." (*4 Mass. Hist. Coll.* VI. 58.)

The Writ of Error suggested by Downing was never brought. The Colony had paid no regard to the summons to return the charter, and the government continued on as if Westminster Hall had never spoken. The troubles at home gave many years of peace to the Colony here.

"The Restoration," however, was a signal for letting loose the birds of prey against Massachusetts. Her charter was felt to be in danger. Many charges were brought against the Colony—some true, and some false. There were twenty years of alternate hope and fear. On the return of Stoughton and Bulkley, the agents to the Court at London, in 1679, they brought a letter from Charles II., in which he directs the Colony to send over other persons in six months, to attend to matters connected, among other things, with the charter. "For since the charter," he continues, "by its frame and contents, was originally to be executed in this Kingdom and not in New England, otherwise than by deputation (as is accordingly practiced in all other charters of like nature) 'tis not possible to establish that perfect settlement we so much desire, until these things are better understood." (*Hutchinson's Coll. Papers*, p. 519.) The king here expressed the truth. The Colony framed answers to this letter, in instructions to their agents, in which they claimed that their patent was on the same footing with those more recently issued. But no questions were ever raised respecting the charters of Rhode Island or Connecticut, or, indeed, that of Maryland to Lord Baltimore. It was always understood that these were to be executed upon the place.

The Chief Justices, Rainsford and North, had given their opinion two years before that

treat the subject discussed in a strictly historical point of view, and by the aid of contemporary documents.

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Professor PARKER then addressed the meeting as follows :—

I congratulate the Society upon the great industry and zeal for its interests which have been always evinced by the Recording Secretary ; and Mr. Deane, himself, upon the success which has attended his efforts to ascertain the mode in which charters were formerly granted in England, and the circumstances attending the grant of the First Charter of Massachusetts. He has laid before the Society a mass of curious information, which I venture to believe was not, until his investigation, in the possession of many persons in the United States, and respecting which probably few persons in England itself had accurate knowledge. It shows the very great caution which formerly prevailed there, respecting grants of acts of incorporation, — a caution which might well be observed here, to some extent, — although doubtless the people of this country would never consent to adopt so many formalities as have heretofore attended the English mode of procedure.

As this information was supposed to have some bearing upon a portion of the Lecture delivered by me at the Lowell Institute, last winter, Mr. Deane, with his uniform courtesy and kindness, informed me of his intention to lay the papers before the Society, and submitted copies to my inspection, which, from circumstances, was but a hasty one.

From such consideration as I have been able to give to the subject, I do not regard the new matter now for the first time accessible here, as infringing, in any material degree, upon the

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the Charter of 4th Car. I., “made the Adventurers a corporation upon the place”; and the Attorney General Sawyer, in the subsequent reign, expressed the opinion that the grantees might transfer their patent. But Chalmers intimates that they never carefully examined the patent, nor studied its history. (*Annals*, 173.)

views which I expressed in that Lecture, respecting the true construction of the First Charter.

The only bearing which these papers have upon the subjects there discussed, is upon the right of the grantees to transfer the charter, and the government of the Colony, to this country.

The additional evidence found in these papers, which it is supposed may affect that question, is in the information respecting the mode in which charters were granted at that time, showing the different stages of the progress, from the petition in the first instance, to the final perfection of the grant, — and particularly in showing that the Docket, as it is termed, is a paper signed by the Attorney or Solicitor General, or both, addressed to the king, and appended to the King's Bill, as it is called, which Bill is a draft of the charter, submitted to the king for his approval. The purpose of this Docket, thus annexed, is, to set forth, briefly, the object and contents of the Bill, for his Majesty's information. It forms no part of the Bill, or charter, but is a mere representation to enable the king more readily to understand the Bill, or proposed charter.

Chalmers professes to give a copy of the "docquet" as taken out of the Privy Seal office; and from the terms of his copy, it would appear to be a memorandum of the character of the charter, and of the proceedings relating to it, made and kept in that office. It has none of the forms of a representation to the king, but is historical in its character, and, for aught which appears, might have been made up at different times. In fact, the last part of it evidently was made after the charter had finally passed, as it states the date of the passage.

The description of the charter, as there set down, so far as it relates to the present question, is, "a grant and confirmation to Sir Henry Rosewell and others," — "incorporating them by the name of the governor and company of the Massachusetts Bay in New England, in America, with such other privileges, for *electing governor and officers here in England for the said company*," &c. Finding no such language in the charter, and

no other terms confining elections to England, I was induced to suppose, naturally, I think, that this Docket, like the memoranda of dockets in court, stated proceedings at different stages, and that a part of the charter relating to the election of governors, &c., had been altered afterwards, and the restrictive clause left out.

The papers now furnished through the investigation of our distinguished associate and Secretary, show that this was a mistaken supposition, — that the Docket, or representation to the king, annexed to the charter, as presented for his signature, contained that clause, whatever may be its signification, that he prefixed his signature, and that although three copies of the charter were made, there was no alteration, so far as appears, in it.

I submit that all this in no way impairs the force of the argument which I had the honor to make respecting the true construction of the charter, — showing, as I thought, that the charter itself did authorize the establishment of the government in Massachusetts, in the manner in which the grantees did in fact establish it, and that it was then so understood. The phraseology which is found in the Docket, and which is used as an argument to show that the election of governors and officers was confined to England, is not in the charter, and, it would seem, was never in it. Whether it was once in the charter and struck out, as I at first supposed, or whether it never was there, as it now appears, is quite immaterial to the argument and to the conclusion. It is not there. It was not in the charter when it was granted. It forms no part of it. That is the material fact. That the Docket contains it, is immaterial.

The king may, or may not, have read the charter, and the Docket, one or both. It is immaterial whether he read either. If he did read the charter, he must be presumed to have seen that the charter contained no clause confining the election of governors and other officers to England. If he trusted to

the representations in the Docket, or, not reading that, to the verbal representations of his officers, and thus supposed the charter to be what it was not, that cannot affect the rules which must govern the construction of the charter. The Docket itself formed no part of the charter, notwithstanding it was annexed to the draft of it submitted to the king; and neither that nor any verbal representations of his ministers, if there were such, could have been admitted to contradict or vary the construction of the instrument itself, which, in the absence of any ambiguity, or even in the case of an ambiguity arising from its terms, must be construed by a sound interpretation of its provisions, as appearing on the face of it. I appeal to learned gentlemen before me, who have held distinguished positions upon the bench of the Supreme Court of the Commonwealth, if that is not the rule of law in relation to the construction of written instruments. They assent and sustain my position. But here is no ambiguity. The language of the charter, although it contains no express provision on this subject of the transfer, is consistent with itself. There is, in fact, nothing that requires explanation by extrinsic evidence. To use the Docket to give a construction to it, would be to raise an ambiguity and an uncertainty, instead of furnishing a solution of an existing doubt, while it would be a direct violation of one of the most ordinary rules of law. Whether the charter does or does not confer a power to establish government in Colony, must be determined by a consideration of what is contained in it.\*

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\* The Docket was not introduced by me as forming any part of the charter, but as furnishing evidence historically of the intention of the grantor. Distinguished historians like Hutchinson, Chalmers, Robertson, and Graham, and jurists like Marshall and Story, have maintained, from an examination of the provisions of the charter itself, that it was intended to be executed within the realm, with power to establish a subordinate government and magistracy upon the plantation,—like the Great Plymouth Patent of Nov. 3, 1620. The eminent authority of Professor Parker is now brought to bear against this opinion. It seemed to me, therefore, not unreasonable, as to its bearing on the historical question, to introduce evidence to show the understanding of the crown

The propriety of the general rule is made manifest in this very case. Whatever was contained in the Docket, was a matter between the king and his officers, and not between his Majesty and the grantees. Not only had the grantees nothing to do with making up the Docket, but there is not a particle of evidence to show that any one of them ever saw it, or had any knowledge whatever of its contents. It would be gross injustice to restrict or limit the powers which the charter purported to confer; powers which, to a greater or less extent, induced the grantees to accept and act under it, — by a supposition on the part of his Majesty, wholly unknown to them, that it was restricted in a very important particular, of which supposition also they had no knowledge nor any means of knowledge.

But the case does not rest on this argument. It does not rest on the rule excluding extrinsic evidence, nor upon construction, derived from the terms of the charter itself. The contemporary construction, as shown, both affirmatively and negatively, is wholly in favor of the existence of authority, derived from the charter of course, to establish the government within the limits of the Colony, and goes to prove that it was not supposed by the king, or the law officers of the crown, that there had been any representations to his Majesty that the government had a 'local habitation' in England, which it could not lawfully change.

The grantees, within a few months after the charter was issued, proceeded, on due deliberation, and with competent

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officers at the time of the granting of the charter, and the action of the grantees on receiving it.

That Professor Parker has given above a sound exposition of the law for the interpretation of private contracts and other strictly legal papers, I am bound to believe. Whether the same doctrine will apply to the interpretation of Municipal Charters or other instruments of a political or semi-political character, to the exclusion of what is called "contemporary exposition," may well be questioned. In interpreting the Constitution of the United States, an instrument framed within the memory of many now living, jurists and historians do not hesitate to cite the proceedings of the Convention which framed it, or the expositions of the writers of the "Federalist," or the doings of the First Congress. — NOTE BY MR. DEANE.

legal advice it would seem, to transfer the charter and the government to the Colony, and there to exercise all the authority which the charter conferred.

This thing was not done in a corner, and must have been known, almost immediately, to the king and his council. The fact came before them officially, in a very short time, by reason of complaints respecting some of the proceedings of the colonists; complaints, not of the organization and administration of government in the Colony, but respecting the manner of its administration, as it affected individuals.

If it had been supposed that there was no authority for such an organization within the Colony; nay, if it had not been understood, and well understood, that the authority existed, and that the colonists were lawfully acting under it, we should have before us plenary evidence of indignant remonstrance on the part of the crown officers, and such summary measures as the case admitted of, on the part of his Majesty, to put an immediate stop to the supposed unlawful proceedings.

But instead of this we do not find a lisp of an objection on this point from the king, or the councillors. On the contrary, when in 1632, upon representation by interested parties of "great distraction and much disorder" existing in New England, the matter was referred to the Privy Council, and examined by a committee, the council, so far from taking any objection to the government there, declared "that the appearances were so fair, and hopes so great, that the country would prove both beneficial to this kingdom, and profitable to the particulars, as that the adventurers had cause to go on cheerfully with their undertaking; and rest assured that if things were carried as pretended when the patents were granted, and accordingly as by the patent is appointed, his Majesty would not only maintain the liberties and privileges heretofore granted, but supply any thing farther that might tend to the good government, prosperity, and comfort of his people there, of that place." And his Majesty on the matter being repre-

sented to him; is reported to have "said, that he would have them severely punished who did abuse his governor and the plantation."

I submit that at this time, it could not but have been fully known that the charter was transferred, and the government established here, and that it is absolutely incredible that these proceedings should have been had, and these commendations expressed, if it had been understood by the law officers of the crown, that the government had a locality in England, as the Council of Plymouth had by its charter, and that the king had believed that the Docket so represented the purport and effect of the charter to him, and that he had been deceived in making the grant.

Again; if it had been understood that there was a legal objection to the transfer, and to the establishment of the government here, that objection must have appeared in the writ of *quo warranto* issued in the King's Bench, in 1635, for the purpose of procuring a conviction of usurpation and judgment of ouster against the grantees.

The establishment of the government here, if illegal, rendered all the acts done under it illegal. The objection, if valid, was open, palpable, and admitted neither of excuse nor evasion. But while more than a dozen other exceptions are taken, no objection of this character is raised or suggested. It transcends belief that there could have been an omission to take the objection if it had then been supposed that one of that character existed.\*

It hardly strengthens the position, that the establishment of the government here was not only warranted by the charter, but that it was so understood from the outset, when I repeat,

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\* This process was not founded upon the mere assumption that there was no valid charter, but was, in part, upon an assumption that the company had no rights. There was judgment of seizure of the franchises. The objection that the company had no power to set up government in the colony, if well founded, would have been just as fatal, — just as good a ground for a conviction of usurpation, and judgment of forfeiture and seizure, — as the allegations which were, ostensibly, the ground of that proceeding.



further, that in the several attempts by the Lords Commissioners to obtain possession of the charter, for the purpose of revoking it, no objection of this character was made, and that it first appeared, in any official form, in the reign of Charles II. more than thirty years after the charter was granted and the government established here, and that it then had its origin with Randolph.

#### SUPPLEMENTARY NOTE.

In the Lecture which has been published, I admitted that the words contained in the Docket, "*with such other privileges for electing governors and officers here in England, for the said company,*" were explicit enough to show that when that minute was made there was an intention that the corporation should have a 'local habitation' in England. And regarding this Docket as a memorandum made in the Council, I endeavored to account for the fact that the charter contained no such provision, and for the other circumstances tending to show that it was not supposed that the corporation was so confined and limited, by a supposition that this clause in the Docket was an early memorandum, and that there was a subsequent change of that intention.

When the papers now discovered in the inquiry instituted by Mr. Deane, were presented to my notice through his courtesy, my attention was naturally attracted to the fact that the Docket was a representation of the Attorney or Solicitor General to the King, respecting the object and purport of the proposed charter, and to the effect of that fact upon the argument; and I did not subject the terms of it to any strict scrutiny.

But a careful examination of it, and a comparison with Chalmers's copy of the memorandum found in the Privy Seal office, and which he called the "docquet," shows that there is a very material variance between them. To say nothing of the substitution in Chalmers's copy of the words, "*such other privileges*" instead of "*such clauses,*" which last is the language of the true docket, but which may not be material; there is an entire omission, in the document published by Chalmers, of an important clause directly following the words relating to the election of officers in these words, "*and powers to make laws and ordinances for settling the government and magistracy for the plantation there.*" So that this part of the Docket reads thus, — "*Incorporating them,*" &c. "*With such clauses for the electing of governors and officers here in England for the said company, and powers to make laws and ordinances for settling the government and magistracy for the plantation there,*" &c.

Now it might savor of presumption were I to say that here are two distinct clauses, intended for different purposes; that the last supplements the first, with an additional and different power, which might supersede the use of the first; and that the true and undoubted meaning of this language is, that the charter gave power to elect governors and officers in England, and a further power to make laws and ordinances by which the government and magistracy might be

established [*settled*] in the colony, so that the governor and other officers might afterwards be elected there.

But I do say that the clause is susceptible of that construction ; that such construction gives operation and significance to the whole of the language which I have quoted (which is required in construing instruments, if it may be done) ; that it renders the action of the grantees perfectly consistent with this language of the Docket, for they acted precisely in that manner (they elected a governor in England, and then made an ordinance for "*settling*" the government and magistracy of the plantation within the colony), that it explains why no objection was made by king or council when the government was *settled* here, because the right to do so was known and recognized ; why no suggestion that such settlement was unwarranted was made when complaints were heard before the council of "great distraction and much disorder" in New England, and when the matter respecting that hearing was reported to the king ; why no allegation was inserted in the process of *quo warranto* that this "*settling*," or setting up government here was a usurpation ; why the Lords Commissioners made no objections of that character ; and why, for thirty years, nothing was uttered from any official source, against the lawfulness of this settlement of the government and magistracy here.

With the real docket before me, I, at the least, should not have made an admission that there was evidence to show an intention, at any time, to confine the corporation to a local habitation in England.

The further memorandum in the Docket, that the corporation is to have such other privileges as were possessed by the Council at Plymouth, cannot affect this question. That corporation had a local habitation at Plymouth, in the county of Devon, by the express terms of the grant, and it was a restriction, rather than a privilege.

Mr. DEANE made a brief rejoinder to some of the remarks of Professor Parker ; but he believes that what he said is substantially included in the paper read by him, and in the notes appended thereto.